SUPREME COURT, U.S.

FILED

JUL 31 1973

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-211

JOHN WAYNE SHELTON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

PETITION FOR WRIT OF CERTIORARI

****

Norman B. Smith

Smith, Patterson, Follin & Curtis
816 Southeastern Building
Greensboro, N. C. 27401
Telephone: 919-275-8603

Counsel for Petitioner

INDEX

	Page
Table of Citations	iii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Argument	6
1. The petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution when the District Attorney was allowed to argue during his opeining statement that the State's witness, an alleged accomplice, Eddie Ray Spivey, had come into Court and pled guilty to the particular crime with which the petitioner was charged and would testify to the participation of other persons in the crime.	6
2. The petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution when the State's witness was allowed to testify to other unrelated crimes allegedly committed by him and by the petitioner.	9
3. The petitioner was denied due process of law under the Fourteenth Amendment of the United States Constitution when his conviction was based solely on the uncorroborated and uncertain testimony of an alleged accomplice.	15
Conclusion	19

Appendix 20
Opinion of the North Carolina Court of Appeals 20
Opinion of the Supreme Court of North Carolina 25

TABLE OF CITATIONS

Page

CASES:

Babb v. United States, 218 F.2d 538 (5th Cir. 1955) 9

Boyd v. United States, 142 U.S. 450, 35 L.ed. 1077, 12 S.Ct. 292 (1892) 10

Carter v. United States, 281 F.2d 640, cert. denied 364 U.S. 880, 5 L.ed.2d 102, 81 S.Ct. 168 (1960) 9

Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938) 17

Ing v. United States, 278 F.2d 362 (9th Cir. 1960) 17

Lincoln v. State, 191 Ind. 426, 133 N.E. 35 (1921) 7

Madigan v. United States, 23 F.2d 180 (10th Cir.) 16

Nilva v. United States, 212 F.2d 115 (8th Cir. 1954) 16

People v. Watson, 307 Mich. 596, 12 N.W.2d 476, cert. denied 323 U.S. 749, 89 L.ed. 600, 65 S.Ct. 81 (1943) 8

Powers v. Commonwealth, 139 Ky. 815, 83 S.W. 146 (1904) 7

Pryor v. State, 34 Okla. Cr. 131, 245 P. 669 (1926) 7

Quig v. United States, 33 F.2d 820 (3rd Cir. 1929) 7

Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943) 17

State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921) 7

State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939) 14

Page

State v. Hunt, 352 S.W.2d 57 (Mo. App.) 8
State v. Jackson, 47 N.M. 415, 143 P.2d 875 (1943) 9
State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954) 10
State v. Peters, 107 A.2d 428 (R.I. 1954) 7
Stewart v. United States, 211 F. 41 (9th Cir. 1914) 7
United States v. Harris, 331 F.2d 185 (4th Cir. 1964) 10
Vecchio v. State, 15 Ohio App. 153 (1921) 8
Webster v. Commonwealth, 223 Ky. 369, 3 S.W.2d 754 (1928) 9

CONSTITUTIONAL PROVISIONS:
Constitution of the United States, Amendment XIV 3

MISCELLANEOUS:
23 C.J.S., Criminal Law §810 (1)(c) 17
23 C.J.S., Criminal Law §812 (2)(b) 19

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

JOHN WAYNE SHELTON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

The petitioner, John Wayne Shelton, prays that a writ of certiorari issue to review the judgment made by the North Carolina Court of Appeals, entered March 28, 1973, affirming the conviction of the petitioner by the Superior Court Division, General Court of Justice of Surry County, North Carolina, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered May 1, 1973.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals ___ N.C. App. ___, 195 S.E.2d 369 (1973) is appended to this

petition. The judgment of the Supreme Court of North Carolina denying petitioner's petition for certiorari, ___ N.C. ___, 196 S.E.2d 276 (1973) is also appended to this petition.

JURISDICTION

The judgment of the Superior Court of Surry County convicting the petitioner of the offense of safecracking in violation of North Carolina General Statutes 14-89.1 and ordering him to be imprisoned for not less than ten or more than twelve years in the State prison was made and entered May 10, 1972. Petitioner's relief in the North Carolina courts was exhausted when his conviction was affirmed by the North Carolina Court of Appeals and when on May 1, 1973 the Supreme Court of North Carolina denied his petition for certiorari. The jurisdiction of this court is invoked under 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

I. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the District Attorney was allowed to argue during his opening statement that the State's witness, an alleged accomplice named Eddie Ray Spivey, had come into Court and pled guilty to the particular crime with which the petitioner was charged and would testify to the participation of other persons in the crime?

II. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States when the State's witness was allowed to testify to other unrelated crimes allegedly committed by the State's witness and by the petitioner?

III. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the Constitution of the United States when his conviction was based solely on the uncorroborated and uncertain testimony of the alleged accomplice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was tried under an indictment which charged that on the 21st day of September, 1971, he did unlawfully, willfully and feloniously forced open the safe of the Harris Home Center, a corporation doing business on West Main Street in Pilot Mountain, North Carolina, and that the safe was used for storing money and other valuables. (R p. 4) Petitioner was tried during the May 8, 1972 regular session of the Superior Court Division of the Surry County General Court of Justice. At the trial the petitioner entered a plea of not guilty.

During the selection of the jury, the District Attorney stated to the jury that a State's witness, an alleged accomplice named Eddie Ray Spivey, had pled guilty to the crime with which the petitioner was charged and would testify as to the petitioner's participation in the crime. (R p. 12) Petitioner's attorney objected to the Solicitor's statements and moved for a mistrial on that basis. The Court overruled the motion. (R pp. 12-13)

During the trial a number of witnesses testified for the State. However, except for the testimony of the accomplice, Eddie Ray Spivey, there was no direct testimony or circumstantial evidence to indicate that petitioner had participated in the crime. The evidence for the State tended to show merely that a safecracking had occurred on the date in question. (e.g. R p. 13, et. seq.)

The accomplice, Eddie Ray Spivey, testified that he was under indictment in 40 to 50 cases. (R p. 37) Over objection by the petitioner's attorney, he was permitted to testify as to whether or not the petitioner was involved in any of the other 40 to 50 cases in which the witness had been indicted. (R pp. 37-38)

The testimony of Eddie Ray Spivey, the alleged accomplice, was exceptionally vague, (R pp. 20-41) and he further testified that he would "do anything" to keep from going to jail. (R p. 41)

At the close of the State's evidence, the petitioner moved for a judgment of nonsuit. The motion was overruled. The petitioner elected to offer no evidence and renewed his motion for nonsuit made at the close of the State's evidence. The jury returned a verdict of guilty and the petitioner moved to set the verdict aside on the grounds of insufficient evidence to justify the conviction. This motion was also denied. Petitioner was sentenced to be imprisoned for not less than ten or more than twelve years.

ARGUMENT

The decision below should be reviewed because the North Carolina Court of Appeals decided a federal question of substantial importance about which there is a great dispute between the States.

The issues raised in this petition for certiorari are whether the petitioner was denied due process of law when the district attorney was allowed to argue during his opening statement that an alleged accomplice had pled guilty to this particular crime, when a State's witness was allowed to testify to other unrelated crimes allegedly committed by him and the petitioner, and when the sole evidence against the petitioner was the testimony of an alleged accomplice which was not corroborated by any other testimony or evidence. The North Carolina Court of Appeals held that the petitioner had not been denied due process of law in any of the above situations.

1. The petitioner's right to due process of law was abridged by allowing the State to argue in its opening argument that a State's witness, an alleged accomplice, had pled guilty to this particular crime and would testify as to the participation of the petitioner in that crime.

During his opening statement the prosecuting attorney stated that the State would "rely in part upon the testimony of one Eddie Ray Spivey, who during this term

of Court has pled guilty to this crime and who will testify against the other defendants in this case and their participation in it." Such a statement at the very opening of the trial was highly prejudicial since it would naturally have a serious and, perhaps, permanent effect on the jurors' minds. Quig v. United States, 33 F.2d 820 (3rd Cir. 1929). Immediately after the statement was made petitioner's attorney objected and then out of the presence of the jury the trial judge overruled that objection.

Cases throughout the United States have held that a statement by a prosecuting attorney during his opening argument to the jury that another defendant has pled guilty to the same crime is prejudicial and presents grounds for a new trial. Quig v. United States, supra; State v. Peters, 107 A.2d 428 (R.I. 1954); Pryor v. State, 34 Okla. Cr. 131, 245 P. 669 (1926); Lincoln v. State, 191 Ind. 426, 133 N.E. 351 (1921). This is especially true in those cases where the court fails or refuses after objection to correct the effect of the prosecutor's argument. See, e.g. Pryor v. State, supra; State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921); Powers v. Commonwealth, 139 Ky. 815, 83 S.W. 146 (1904). In fact, in those cases where it has been held that such statements are not prejudicial, the holding has been almost universally based on a finding that the court had cured the prejudicial effects of such statements through its rulings and instructions to the jury. See, e.g. Stewart v. United States, 211 F. 41 (9th Cir. 1914);

People v. Watson, 307 Mich. 596, 12 N.W.2d 476, cert. denied 323 U.S. 749, 89 L.ed. 600, 65 S.Ct. 81 (1943); Vecchio v. State, 15 Ohio App. 153 (1921); State v. Hunt, 352 S.W.2d 57 (Mo. App.). In all the above cases it was conceded by the courts that the statements were highly prejudicial and, unless corrected by proper action of the trial court, would require the granting of a new trial. In the present case there was no action taken by the trial judge to dissipate the prejudicial effects of the prosecutor's statements. He did not sustain the petitioner's objection, instruct the jury to disregard the prosecutor's statement, or in any other way indicate to the jury that the act of an alleged accomplice in pleading guilty was binding only on him and did not in any way affect the rights of the defendant on trial.

The situation was aggravated when the prosecutor attempted to bring out from the alleged accomplice during his testimony the fact that he had pled guilty to the same crime. The prosecutor asked whether the witness, Eddie Ray Spivey, the alleged accomplice, had entered a plea of guilty. The witness answered yes, and the petitioner's attorney objected. At that point, after the testimony was before the jury, the prosecutor asked that his own question be stricken and it was stricken by the trial judge. This testimony was most effective in reinforcing the prejudicial effect of the prosecutor's earlier statement. This is especially so because the jurors had not been instructed to disregard this earlier statement. Many cases across

the United States have held that a new trial must be granted if an alleged accomplice is allowed to testify over objection that he has pled guilty to the same crime. See, e.g. Babb v. United States, 218 F.2d 538 (5th Cir. 1955); State v. Jackson, 47 N.M. 415, 143 P.2d 875 (1943); Webster v. Commonwealth, 223 Ky. 369, 3 S.W.2d 754 (1928). In situations such as this courts have again held that in certain cases the prejudicial effect of such a witness's testimony can be cured by prompt and proper instructions. See, e.g. Carter v. United States, 281 F.2d 640, cert. denied 364 U.S. 880, 5 L.ed.2d 102, 81 S.Ct. 168 (1960). In the present case there were no such instructions.

From the foregoing it is clear that the effect of the prosecutor's statement and his later attempt to reinforce that statement with actual testimony is so highly prejudicial and the prejudice so fundamental that it deprived the petitioner of a fair trial, which is the essence of due process. Such a violation of due process, which was properly objected to and which the trial court failed and refused to cure, required that the petitioner be granted a new trial.

2. The petitioner was deprived of due process of law when the State was allowed to elicit testimony over objection which indicated that the petitioner had committed other crimes.

In questioning a State's witness, Eddie Ray Spivey, an alleged accomplice,

the prosecutor asked the witness to state "whether or not either of these defendants were involved with [him] in the [40 to 50 other cases in which the witness had been indicted]." The petitioner objected, his objection was overruled, and the witness answered that the petitioner was involved with him in some of these other cases. The petitioner moved to strike this testimony and this motion was also denied. The prosecutor then asked: "Do I understand that you have been involved with both of the defendants?" The petitioner objected, his objection was overruled, and the witness answered: "Yes, sir."

It is elemental law that evidence of offenses unconnected with the offense for which the accused is on trial is inadmissible. Boyd v. United States, 142 U.S. 450, 35 L.ed. 1077, 12 S.Ct. 292 (1892); State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954). "It is inconsistent with our traditional conception of a fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged." United States v. Harris, 331 F.2d 185, 187 (4th Cir. 1964).

The rationales behind the above rule were clearly set out by Justice Ervin of the North Carolina Supreme Court (now Senator Ervin of North Carolina) in his opinion in State v. McClain, 240 N.C. 171, 81 S.E. 2d 364, 365-366 (1954) (citations omitted) as follows:

The general rule rests on these

cogent reasons: (1) "logically, the commission of an independent offense is not proof in itself of the commission of another crime." (2) evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose. (3) "proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." (4) "furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it."

The general rule set forth above is subject to certain well defined and limited exceptions. The only one of those exceptions which could remotely authorize the testimony set forth above was the one on which the North Carolina Court of Appeals based its decision. That exception as set forth by the North Carolina Court of Appeals states:

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (citations omitted) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

It is clear that the testimony in this case does not meet the requirements of that exception. The testimony of the State's witness on cross examination indicated that the State's witness following his arrest the previous fall had been questioned about a number of crimes that had been committed and that he had then admitted that he was involved in 45 to 50 of the crimes mentioned to him. No description of the crimes was ever made,

though it appears that some of the crimes were break-ins. This testimony on cross examination was then followed by the following questions by the prosecutor:

Q. Mr. Spivey, do I understand that you are under indictment in 40 or 50 cases?

A. Yes, sir.

Q. In how many of them have you been tried?

A. Two or three.

Q. Has any judgment been entered in any of the cases?

A. No, sir.

Q. Please state to the Court and the jury whether or not either of these defendants were involved with you in the other cases?

Attorney Pettyjohn: Objection.

Court: Overruled.

A. Yes, sir.

Q. Which one?

A. Shelton.

Attorney Pettyjohn: Objection, move to strike.

Court: Objection overruled and motion to strike overruled.

At no point was it indicated which of the 45 to 50 crimes were participated in by the petitioner and what type of crimes these were. There being no evidence as to the type of other crimes the petitioner had allegedly engaged in, it is impossible to say that this was "a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." It is therefore clear that the testimony allowed into evidence over the petitioner's objection did not and does not fall within this particular exception or any other exception to the general rule stated above. The evidence was thus of a type adduced only to place in the minds of the jurors the belief that because he committed one crime the petitioner also committed this one. "Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." State v. Gregory, 191 S.C. 212, 4 S.E.2d 1, 4 (1939). Especially is this so when the prosecutor is then allowed to use this testimony to argue to the jury that the crime charged was just a part of a "crime wave" in which the petitioner was involved. To allow testimony of this type is "inconsistent with our traditional conception of a fair trial", and in allowing the above testimony into evidence the North Carolina Court of Appeals deprived the petitioner of due process of law.

3. Petitioner was denied due process of law when his conviction was based solely on the uncorroborated and uncertain testimony of an alleged accomplice.

The only evidence linking the petitioner with the crime charged was the testimony of the alleged accomplice, Eddie Ray Spivey, who was most confused and uncertain. The prosecutor elicited the only testimony damaging to the petitioner through the continuous use of leading questions. (The North Carolina Court of Appeals held that the allowance of leading questions was completely within the trial court's discretion and did not constitute reversible error.) It became very clear on cross examination the the witness needed the guidance of these leading questions to remember the events about which he was testifying. He was frequently forgetful (see, e.g. R. pp. 29-37) and confused. He could not remember how or when he and his alleged accomplices had gotten together the evening of the crime, (R. pp. 27, 29), the date the crime allegedly occurred, (R. p. 29), or the physical description of the scene of the crime, (R. p. 30).

Mr. Spivey further testified that he had admitted to 45 to 50 other crimes (R. p. 31), and hoped that his testimony in this case might help him get probation for his other crimes, (R. p. 33), that he was testifying in order to save his own neck, (R. p. 37), and that he had said that he would do and say anything to keep from going to jail, (R. p. 37). He also admitted that he had once testified under oath

that he and a Jimmy Smith had broken into the Arnold Palmer Driving Range in Winston-Salem, North Carolina, on May 3, 1971. (R. p. 34) Mr. C. G. Cline, another witness for the State, later testified that based on Mr. Spivey's statement he had arrested Jimmy Smith for the break in at the Arnold Palmer Driving Range on May 3, 1971, but that he had later discovered that Mr. Smith was in the Forsyth County Jail on May 3, 1971. (R. pp. 49-50)

It is clear from the above that Mr. Spivey's testimony was most uncertain and its veracity was seriously eroded. The State presented no corroborative evidence to connect the petitioner with the crime charged. The petitioner's freedom thus hinged on the unclear, contradictory, and uncorroborated testimony of the alleged accomplice. To allow the petitioner's conviction to stand on evidence of this type violates the petitioner's right to due process of law.

The common law rule appears to have been that the testimony of an accomplice may be sufficient to warrant a conviction, even though it is not corroborated. Nilva v. United States, 212 F.2d 115 (8th Cir. 1954). However, that rule has been severely limited, and even where it is still recognized the view has been that while a jury may convict on the uncorroborated testimony of an accomplice, they should not do so, and that such testimony is subject to grave suspicion. Madigan v. United States, 23 F.2d 180 (10th Cir.).

The reason most generally stated for a rule requiring corroboration of an accomplice is that a witness could otherwise transfer responsibility for a crime from his own shoulders to another's. Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938). It has therefore often been held that corroboration is necessary when there are circumstances which tend to throw suspicion on the testimony of an accomplice, as when the testimony is contradictory, inconsistent, or where it appears that the witness has sworn falsely to a material matter. 23 C.J.S., Criminal Law §810(1)(c). And the corroborative evidence must, without the aid of any testimony of the accomplice, connect or tend to connect the accused with the crime charged. See, e.g. Ing v. United States, 278 F.2d 362, 367 (9th Cir. 1960); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943).

In the present case there was an overwhelming need for corroborative evidence. The alleged accomplice's testimony was uncertain, inconsistent, and, at points, contradictory. His memory of any but the most basic facts was totally lacking. It appears that on at least one other occasion he gave sworn testimony implicating another person in a crime that person could not have committed because the one he accused was already incarcerated on the date of the crime. And over all his testimony are the accomplice's admissions that he was testifying to save his own neck and that he would do and say anything to keep from going to jail. With such testimony from such a witness, the chances

of abuse are so obvious and the likelihood that the witness was not truthful so great that the State must be required to properly corroborate the testimony of the accomplice before the accused can be convicted. To allow the petitioner's conviction to stand without such corroboration makes the trial of the petitioner inherently unfair and deprives him of due process of law.

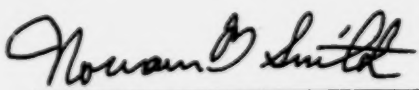
It appears that this Court has never considered the question of whether the failure to corroborate an accomplice's testimony is a deprivation of due process of law. This Court should make this determination because it is an important issue of law and because the rules vary so greatly from state to state. It is clear from the testimony in the present case that to allow an accomplice to testify and to have his uncorroborated testimony serve as the sole basis for the conviction gives rise to such a great chance of abuse and unfairness that such a practice should be declared in violation of an accused's right to due process of law.

In the present case the State attempted to corroborate the testimony of the accomplice through testimony of others to the effect that the accomplice's statement was the same as he had made to them previously and that certain physical facts were as the accomplice stated. However, there was no evidence other than the accomplice's which tended to connect the petitioner with the crime charged. The evidence required to corroborate an

accomplice's testimony must be such that it connects the accused to the crime charged without reference to the testimony of the accomplice. 23 C.J.S., Criminal Law §812 (2)(b) and cases cited therein. Since there was no corroborative evidence of this type and since corroborative evidence was essential to insure the petitioner a fair trial, the petitioner's conviction abridged his right to due process of law. The petitioner respectfully requests this Court to review the decision of the North Carolina Court of Appeals and determine that such uncorroborated testimony cannot form the basis for the petitioner's conviction.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



Counsel for Petitioner
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, N. C. 27401
Telephone: 919-275-8603

APPENDIX TO PETITION

No. 7217SC791 SEVENTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1973

STATE OF NORTH CAROLINA

v. From Surry

ERNEST DALE SMITH and
JOHN WAYNE SHELTON

Appeal by defendant from Crissman, Judge, 8 May 1972 Session of Superior Court held in Surry County.

Defendant was tried on an indictment charging him with safecracking in violation of G.S. 14-89.1. Without objection he was tried jointly with one Ernest Dale Smith, who was charged with the same offense. The principal evidence against defendant and Smith was provided by the testimony of Eddie Ray Spivey, an accomplice. Defendant and Smith offered no evidence. Defendant was found guilty as charged, and from judgment imposing prison sentence, he appealed.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

H. Glenn Pettyjohn for defendant appellant.

PARKER, Judge. Defendant's first assignment of error is directed to the denial of his motion for mistrial. The reason stated by defendant's counsel for making motion for mistrial was that the solicitor, in his opening statement made during the process of selecting the jury, stated that Spivey had come into court and pleaded guilty to the same offense for which defendant was being tried. Insofar as the record before us discloses, however, the only statement which the solicitor made in the presence of the jury panel was to the effect that the State contended that Spivey was a reliable witness, and then the solicitor inquired if any member of the jury panel "would not under any circumstances take the testimony of an accomplice?" The record does not contain the statement attributed to the solicitor as the reason given by defendant for his motion for mistrial, but contains only a statement by defendant's counsel as to what the solicitor said. We cannot accept the statement of counsel as sole support for the remarks challenged. 3 Strong, N.C. Index 2d, Criminal Law, § 158. Moreover, even if the remarks attributed to the solicitor were made inthe presence of the jury panel, in our opinion no prejudicial error resulted under the circumstances of his case. Spivey was presented as a witness for the State, testified in detail concerning his own and defendant's participation in the offense for which defendant was tried, and was subjected to full cross-examination by

defendant's counsel. Defendant's first assignment of error is overruled.

In his second assignment of error defendant contends the court erred in permitting the solicitor to "lead" the witness Spivey in his testimony. The contention is without merit. It is well settled that the allowance of leading questions is a matter entirely within the discretion of the trial judge and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion. Stansbury, N.C. Evidence 2d, §31, p. 59. No abuse of discretion is shown.

In his third assignment of error defendant contends the court erred in permitting the witness Spivey to testify to other crimes allegedly committed by him together with defendant and Smith. Spivey's testimony tended to show a conspiracy between Spivey, Smith and defendant to break and enter the Harris Home Center, Inc., in whose place of business the alleged safecracking occurred. In cross-examining Spivey, defendant's attorney elicited testimony tending to attack Spivey's credibility, including testimony that Spivey had been involved in some 45 or 50 crimes to which he had confessed and in which he had implicated others. On redirect examination, Spivey testified that he was under indictment in 40 or 50 cases and, over objection, testified that defendant and Smith were involved with him in some or all of the other cases.

The general rule is that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. State v. Fowler, 230 N.C. 470, 53 S.E.2d 853; State v. Choate, 228 N.C. 491, 46 S.E.2d 476. This is true even though the other offense is of the same nature as the crime charged. State v. Jeffries, 117 N.C. 727, 23 S.E. 163. However, the rule stated is subject to certain well recognized exceptions set forth by Ervin, J., in State v. McClain, 240 N.C. 171, 81 S.E.2d 364. We think the testimony challenged here falls within the sixth exception set forth in McClain, as follows:

> "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (Citations omitted.) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

This assignment of error is overruled.

Defendant's fourth assignment of error relates to what we view as a "slip of the tongue." S.B.I. Agent Batten, as a witness

for the State, was asked by the solicitor if defendant made a statement to him relative to "this particular breaking and entering." Defense counsel objected and the court instructed the jury to consider the answer "for the purpose of corroborating the testimony of the witness Spivey if you find that it does corroborate his testimony and for that purpose only." Thereafter, the witness testified that Mr. Spivey made a statement and the witness proceeded to relate the statement. We think the instruction of the court and the testimony of the witness made it completely clear that the statement which the witness related was made by Spivey and not by defendant. This assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but finding them also without merit, they too are overruled.

No error.

Judges BRITT and VAUGHN concur.

Filed March 28, 1973

No. 57PC SEVENTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Session 1973

****

STATE OF NORTH CAROLINA)
)
v.) From Surry
)
ERNEST DALE SMITH and)
JOHN WAYNE SHELTON)

****

Petition for writ of certiorari by John Wayne Shelton to review the decision of the North Carolina Court of Appeals, 195 S.E.2d 369. Denied.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 22 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1973

No. 73-211

JOHN WAYNE SHELTON,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

ROBERT MORGAN
Attorney General of
North Carolina

JAMES F. BULLOCK
Deputy Attorney General

HENRY E. POOLE
Associate Attorney

Counsel for Respondent

Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone (919) 829-4494

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-711

JOHN WAYNE SHELTON,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

ROBERT MORGAN
Attorney General of
North Carolina

JAMES F. BULLOCK
Deputy Attorney General

HENRY E. POOLE
Associate Attorney

Counsel for Respondent

Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone (919) 829-4494

INDEX

		Page
TABLE OF CITATIONS		ii
STATEMENT OF THE CASE		1
ARGUMENT		
I.	THE PETITIONERS RIGHT TO DUE PROCESS OF LAW WAS NOT ABRIDGED BY THE ACTIONS OF THE STATE DURING THE PROCESS OF SELECTING THE JURY.	2
II.	THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE STATE ELICITED TESTIMONY INDICATING THE PETITIONER HAD COMMITTED OTHER CRIMES.	6
III.	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN HIS CONVICTION WAS BASED UPON THE TESTIMONY FOUND IN THE COURT RECORD.	8
CONCLUSION		10

TABLE OF CITATIONS

CASES:	Page
Babb v. United States, 218 F. 2d 538 (5th Cir., 1955)	5
Carter v. United States, 281 F. 2d 640, Cert. Den 364 U.S. 880, 5 L.Ed. 2d 102, 81 S.Ct. 168 (1960)	6
Claypoole v. McIntosh, 182 N.C. 109, 108 S.E. 2d 433 (1921)	3
Indemnity Company v. Tanning Company, *187 N.C. 190, 121 S.E. 2d 468 (1923)*	3
Nilva v. United States, 212 F. 2d 115 (8th Cir., 1954)	9
State v. Daniels, 231 N.C. 17, 56 S.E. 2d 2, Cert. Den. 339 U.S. 954, 94 L.Ed. 1366 (1949)	3
State v. Duncan, 270 N.C. 241, 154 S.E. 2d 53 (1967)	3
State v. Fowler, 230 N.C. 470, 53 S.E. 2d 853 (1949)	7
State v. Frizzell, 111 N.C. 722, 16 S.E. 2d 409 (1892)	3
State v. Hairston and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220 at 223, 183 S.E. 2d 633 (1971). .	8
State v. Hilton, 271 N.C. 456, 156 S.E. 2d 833 (1967)	3
State v. Jackson, 47 N.M. 415, 143 P. 2d 875 (1943)	5
State v. Jenkins, 234 N.C. 112, 66 S.E. 2d 819 (1951)	3

Page

State v. Kendrick,
9 N.C. App. 688 at 690, 177 S.E. 2d 345 (1970) . 8

State v. Kirby,
3 N.C. App. 43 at 45, 163 S.E. 2d 911 (1968) . . 8

State v. McClain,
240 N.C. 171, 81 S.E. 2d 364 (1954) 7

State v. McNair,
272 N.C. 130 App. 132, 156 S.E. 2d 660 (1967) . 8

State v. Mullins,
233 N.C. 542, 64 S.E. 2d 656 (1951) 3

State v. Parlow,
272 N.C. 60 App. 66, 157 S.E. 2d 688 (1967) . . 8

State v. Roux,
263 N.C. 149, 139 S.E. 2d 189 (1964). 3

State v. Smith and *State v. Shelton*,
17 N.C. App. 694, 695 (1973) 3

State v. Tilley,
239 N.C. 245 at 249, 79 S.E. 2d 473 (1953). . . 8

State v. Wray,
230 N.C. 271, 52 S.E. 2d 878 (1949) 3

Webster v. Commonwealth,
223 Ky. 369, 3 S.W. 2d 754 (1928). 5

MISCELLANEOUS:

24A C.J.S., CRIMINAL LAW §1746 4

24A C.J.S., CRIMINAL LAW §1783 4

Page

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-211

JOHN WAYNE SHELTON,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

In accordance with Rule 40 (3) of the Rules of the Supreme Court of the United States this Brief In Opposition will not contain: (1) Opinions Below, (2) Jurisdiction, (3) Questions Presented, or (4) Constitutional and Statutory Provisions Involved. Also in accordance with Rule 40 (3) this Brief In Opposition will contain a Statement of the Case in order to correct the Petitioner's Statement of Case.

STATEMENT OF CASE

This is a criminal action in which the Petitioner John Wayne Shalton was tried during the May 8, 1972, Session of the Superior Court of Surry County, the Honorable Walter E. Crissman, Judge Presiding, upon an indictment charging the Defendant with the unlawful, willful and felonious forcing open of a safe. The case was heard on a plea of not guilty. The Petitioner was tried and convicted

by a jury of safecracking, which is a violation of N.C. G.S. 14-89.1. The Petitioner was sentenced to not less than ten (10) nor more than twelve (12) years in the North Carolina Department of Corrections. The Petitioner appealed to the North Carolina Court of Appeals, which Court affirmed the Superior Court of Surry County. Following the action of the North Carolina Court of Appeals, a Petition for Writ of Certiorari was made to the North Carolina Supreme Court. This Petition was denied.

During the selection of the jury the District Attorney indicated that the State contended that Eddie Ray Spivey was a reliable witness. Furthermore, the Solicitor asked if any member of the jury panel "would not under any circumstances take the testimony of an accomplice?" (R p 10). The record as transcribed by the Court Reporter does not contain statements which the defense counsel contends were made by the District Attorney to the affect that Eddie Ray Spivey had plead guilty to the crime to which the Petitioner had been indicted and that Eddie Ray Spivey would testify against the Petitioner.

ARGUMENT

I. THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS NOT ABRIDGED BY THE ACTIONS OF THE STATE DURING THE PROCESS OF SELECTING THE JURY.

The Petitioner contends that the District Attorney, during the opening argument, stated to the jury that the State's witness, Eddie Ray Spivey, came into court and plead guilty to safecracking at Harris Home Center. This contention finds no support in the record other than a statement by Petitioner's counsel (R pp 11-12). The Petitioner further contends that the District Attorney's alleged reference to Spivey's guilty plea constitutes prejudicial and reversible error. The record is clear on this point It reflects that the District Attorney, in the process of selecting the jury, stated to the prospective jurors that Spivey was an accomplice of the Petitioner; that Spivey was a reliable witness; and that if, after scrutinizing his testimony as an accomplice the jury found Spivey's testimony to be truthful, it should give his testimony the same weight as that

of any other witness. The District Attorney than asked if under any circumstances any member of the jury would not accept the word of an accomplice (R pp 10-11).

The law is well settled in North Carolina that where the record is silent on a particular point the silence supports the presumption that the procedure in the Court below was regular and free of error. *State v. Mullins*, 233 N.C. 542, 64 S.E. 2d 656 (1951), *Claypoole v. McIntosh*,182 N.C. 109, 108 S.E. 2d 433 (1921), *Indemnity Company v. Tanning Company*, 187 N.C. 190, 121 S.E. 2d 468 (1923).

In the instant case the Respondent contends that no where in the transcribed court record does it appear that the District Attorney stated that he would "rely in part upon the testimony of one Eddie Ray Spivey, who during this term of Court has plead guilty to this crime and who will testify against the other Defendants in this case and their participation in it." (See Petitioner's Brief pp 6-7). This tact was pointed out and upheld by the North Carolina Court of Appeals in its opinion in this case where that Court stated, "The record does not contain the statement attributed to the Solicitor as the reason given by Petitioner for his Motion for Mistrial, but contains only a statement by Petitioner's counsel as to what the Solicitor said." (*State v. Smith* and *State v. Shelton*, 17 N.C. App. 694, 695 (1973)).

Other North Carolina cases on this point hold that "There is a presumption in favor of regularity. Thus, where the matter complained of does not appear of record appellant has failed to make irregularity manifest." *State v. Hilton*, 271 N.C. 456, 156 S.E. 2d 833 (1967), *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). Furthermore, it has been held that it is the duty of the Petitioner to see that the record is properly made up and transmitted. G.S. 15-180. *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); *State v. Jenkins*, 234 N.C. 112, 66 S.E. 2d 819 (1951); *State v. Daniels*, 231 N.C. 17, 56 S.E. 2d 2, Cert. Den 339 U.S. 954, 94 L.Ed. 1366 (1949); *State v. Wray*, 230 N.C. 271, 52 S.E. 2d 878 (1949); *State v. Frizzell*, 111 N.C. 722, 16 S.E. 2d 409 (1892).

It is the generally held view that "only matters properly a part of a record so complete as to enable the reviewing Court

intelligently to pass on them may be considered on appeal; and in absence of such a record, ordinarily, the appeal will be dismissed or the judgment affirmed." 24A C.J.S. CRIMINAL LAW §1783. It is further generally held that "arguments and remarks of counsel constitute no part of the record unless made so by some authorized mode." 24A C.J.S. CRIMINAL LAW §1746. The Respondent contends that in this case if the District Attorney did in fact make the statements which the Petitioner ascribes to him, then it was incumbent upon the Petitioner to make sure that the record so indicated the District Attorney's statements. The Petitioner's failure to insure his alleged completeness of the record has the affect of allowing the Appellate Court to review only that portion of the transcript where the Petitioner's attorney alleges statements were made by the District Attorney.

The Respondent contends that due to the fact that the remarks allegedly made by the District Attorney concerning Eddie Ray Spivey do not appear in the transcript, the Court cannot intelligently make a decision concerning the action of the District Attorney.

The District Attorney and the Petitioner's attorney did stipulate to the record on appeal, said record containing the allegation by the Petitioner's attorney that the District Attorney made the alleged remarks concerning Eddie Ray Spivey. However, in light of the merits of the substantive argument made by the Petitioner the specific wording used by the District Attorney in selecting the jury is of utmost importance.

A careful review of the remarks made by the Court (R pp 12-13) wherein the Court set forth the patterned instructions with regard to testimony of an accomplice, indicates that the remarks by the District Attorney were essentially the same as the patterned instructions. These remarks demonstrate that in the opinion of the Court the statements made by the District Attorney in selecting the jury were totally proper and within permissible constitutional limitations due to the fact that they were very similar to the patterned instructions. Therefore, the precise wording used by the District Attorney in selecting the jury is without a doubt crucial, and without this exact wording appearing in the record it is impossible to know precisely what the District Attorney said.

Although the Respondent contends that these remarks allegedly made by the District Attorney cannot be scrutinized on appellate review, the Respondent would still like to point out that in this case Eddie Ray Spivey was a witness for the State and as such was subject to complete, in depth cross examination by the Petitioner. Through this cross examination the Petitioner should have been able to ascertain all information relevant to the Petitioner which witness Spivey had. Through this cross examination the State contends any inadvertent prejudice which had accrued to the Petitioner could have been completely dissipated. In the instant case no previous pleas or statements of witness Spivey were offered as evidence of guilt of the Petitioner. Spivey appeared as the State's witness, testified as to his own guilt, implicated the Petitioner, and was available for and subjected to complete cross examination by the Petitioner.

The Respondent submits that under such circumstances the statements of the District Attorney to the respective jurors, as found in the transcript, were entirely proper and indeed necessary to the selection of the jury since the State's case rested in part upon the testimony of witness Spivey. Denial of the Petitioner's Motion for Mistrial by the Trial Judge therefore was not error.

Under his first Assignment of Error the Petitioner also alleges that he was irreparably prejudiced due to the fact that Eddie Ray Spivey testified that he had plead guilty to a case brought against him the week preceding the Petitioner's trial (R pp 20-21).

The Petitioner cites three cases for the proposition that "A new trial must be granted if an alleged accomplice is allowed to testify over objection that he has plead guilty to the same crime." (See Petitioner's Brief p 9). The Respondent contends that all three cases cited by the Petitioner (*Babb v. United States*, 218 F. 2d 538 (5th Cir. 1955); *State v. Jackson*, 47 N.M. 415, 143 P. 2d 875 (1943), *Webster v. Commonwealth*, 223 Ky. 369, 3 S.W. 2d 754 (1928)) can be distinguished from the instant case in that in all three of those cases there was either no exception made to the infraction or once made the exception was overruled. The Respondent would point out that in the instant case not only did the District Attorney state "strike that" in response to witness Spivey's answer (R p 21), but the Court instructed the members of the jury not to consider the question and indeed indicated that

he would strike it as well (R p 21). A case cited by the Petitioner, *Carter v. United States*, 281 F 2d 640, Cert. Den 364 U.S. 880, 5 L.Ed. 2d 102, 81 S.Ct. 168 (1960), held that prejudicial statements made by witnesses can be cured by prompt and proper instructions by the Court. The Respondent contends in this case the comments by the Court were prompt and proper thereby curing any prejudicial defect.

In addition, the Respondent notes that even had the Court not so instructed the jury, the remark would still not have been prejudicial. This is due to the fact that the District Attorney asked witness Spivey, "I believe that here last week you entered a plea of guilty?" to which the witness replied, "Yes, Sir." (R pp 20-21). No where from this question or this answer does it appear to what crime witness Spivey is stating he plead guilty. To come within the decisions holding prejudicial error the accomplice would have to testify that he plead guilty to the *same* crime as that for which the Petitioner is being tried. From the question and answer in the instant case the jury could not tell the nature of the crime to which he had plead guilty, much less the specific crime to which he had plead guilty.

II. THE PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHEN THE STATE ELICITED TESTIMONY INDICATING THE PETITIONER HAD COMMITTED OTHER CRIMES.

The Petitioner contends that the Court committed reversible error and deprived the Petitioner of his constitutional right to due process when it permitted witness Spivey to implicate Petitioner in other crimes to which witness Spivey had testified on cross examination. Petitioner grounds this contention on the rationale that the other offenses committed by witness Spivey and Petitioner were independent and not connected with the offense for which the Petitioner was tried.

The testimony of witness Spivey reveals that Spivey, Ernest Dale Smith and the Petitioner John Wayne Shelton, conspired to break into the premises of Harris Home Center for the purpose of

stealing money and other valuable goods. The Petitioner in cross examining Spivey elicited testimony which would tend to impair Spivey's credibility (R pp 31-37), including testimony that Spivey had been involved in some forty-five to fifty crimes, that he had recently confessed to these crimes, that he had implicated other persons in these crimes, and that he had testified concerning some of those crimes (R pp 31-32, 34, 35).

On direct examination witness Spivey subsequently testified that he was under indictment in forty to fifty cases and that the Petitioner, John Wayne Shelton, was involved in those cases with him (R p 37). He also testified that Ernest Dale Smith was involved in some of the cases (R p 38).

Although it is the general rule that evidence of offenses separate and independent of the crime with which a defendant is charged is not admissible, this rule is subject to numerous exceptions. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The Respondent contends that the instant case falls within the exceptions stated by Justice Ervin in *State v. McClain, supra*, at 176 as follows:

> "(6). Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (citations omitted) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

In another North Carolina case, *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949) at page 473, Chief Justice Stacey stated:

> "To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestae* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the

offense charged as to throw light upon one or more of these questions." (citations omitted)

Detective C. G. Cline of the Forsythe Police Department, who was involved in the investigation of some of the crimes in which Spivey was implicated, testified that Spivey was involved in forty cases in five different counties and that the crimes had taken place over a period of nine (9) to ten (10) months (R p 48). The State contends that the evidence given by Spivey and that of Detective Cline " . . . tends to establish a common plan or scheme embracing the commission of a series of crimes . . ." carried out over a period of several months, of which the offense here charged was but one, and that Spivey's evidence of the other crimes tends to establish the *quo animo*, and intent and design of the Respondent. The State submits, therefore that evidence of the other crimes was admissible in the instant case under the above exceptions quoted. *State v. Hairston* and *State v. Howard* and *State v. McIntyre*, 280 N.C. 220 at 223, 183 S.E. 2d 633 (1971).

III. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN HIS CONVICTION WAS BASED UPON THE TESTIMONY FOUND IN THE COURT RECORD.

The Petitioner contends that it was an error and a denial of due process of law for the Court to deny Petitioner's Motions for a direct verdict of acquittal based on the testimony of witness Spivey.

"It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. Tilley*, 239 N.C. 245 at 249, 79 S.E. 2d 473 (1953); *State v. McNair*, 272 N.C. 130 App. 132, 156 W.E. 2d 660 (1967); *State v. Parlow*, 272 N.C. 60 App. 66, 157 S.E. 2d 688 (1967); *State v. Kendrick*, 9 N.C. App. 688 at 690, 177 S.E. 2d 345 (1970); *State v. Kirby*, 3 N.C. App. 43 at 45, 163 S.E. 2d 911 (1968).

This is also the rule in Federal Courts and other jurisdictions within the United States. See for example, *Nilva v. United States*, 212 F. 2d 115 (8th Cir. 1954) where it was held that the common law rule that the testimony of an accomplice may be sufficient to warrant a conviction even though it is not corraborated is still recognized. That case holds that a defendant may be convicted of a crime on the uncorroborated testimony of an accomplice if the jury is convinced of the defendant's guilt beyond reasonable doubt. It was also pointed out in *Nilva v. United States, supra*, that in criminal prosecutions it is the jury's province to consider the weight of the evidence and witnesses' credibility.

While the testimony of Eddie Ray Spivey set forth the details of the crime and the involvement of the Petitioner therein, the corpus delicti was established by the evidence of several other of the State's witnesses, principally Mr. Robert C. Harris, President and General Manager of Harris Home Center (R pp 13-15). In addition, testimony given by Mr. Harris and by Chief Willis J. Fulton of the Pilot Mountain Police corroborates witness Spivey's evidence of the manner of breaking into Harris Home Center (R pp 14, 142); the manner of breaking the safe (R pp 14-15, 142); and the tools used for breaking the safe (R pp 14-15, 43).

The evidence of Special Agent, David J. Beale, North Carolina State Bureau of Investigation, corroborates witness Spivey's evidence of the manner of breaking into Harris Home Center (R p 50), and the manner of breaking into the safe (R p 51). The statement read into evidence by Special Agent Jerry Batten, North Carolina State Bureau of Investigation, as to testimony made to him by witness Spivey corroborates witness Spivey's testimony at the trial (R pp 45-46).

The Petitioner in discussing the testimony of witness Spivey states "He was frequently forgetful (See, *e.g.* R pp 28-37) and confused. He could not remember how or when he and his alleged accomplices had gotten together the evening of the crime (R pp 27, 29), the date the crime actually occurred (R p 29), or the physical description of the scene of the crime (R p 30)."

The Respondent points out that it is little wonder the witness Spivey could not remember some of the specific facts surrounding the commission of the crime for which the Petitioner was being tried. This was due to the fact that, as subsequent testimony brought

out, witness Spivey had been involved in forty to fifty crimes of a similar nature within a nine to ten month period. It would seem strange indeed if witness Spivey was able to remember every fact attendant to this specific crime, considering his general inclination and demeanor concerning break-ins at about this time. Rather, considering the witnesses' considerable illegal activities during this time, the Respondent contends that Spivey's "frequently forgetful and confused" testimony adds credulence to his veracity as a witness.

CONCLUSION

The Respondent contends in this case that the Petitioner, John Wayne Shelton, received a fair and impartial trial. In addition, the Respondent contends that there was overwhelming, competent and direct evidence to find the Petitioner guilty as charged with the crime of safecracking and that if there was error, which is not conceded, it was not sufficiently grave to warrant a new trial.

Respectfully submitted.

ROBERT MORGAN
Attorney General of
North Carolina

JAMES F. BULLOCK
Deputy Attorney General

Henry E. Poole

HENRY E. POOLE
Associate Attorney

Counsel for Respondent

Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone (919) 829-4723